DATE: October 17, 1995
CASE NO.: 95-ERA-00013

In the Matter of

ROBERT SEATER

Complainant

v.

SOUTHERN CALIFORNIA EDISON COMPANY

Respondent

Appearances:

Edward A. Slavin, Jr., Esquire
For Complainant

Michael Healy, Esquire
Thomas A. Schmutz, Esquire
Paul Zaffuts, Esquire
George L. Edgar, Esquire (on the Brief)
For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 ("the Act"). The Act protects employees who assist or participate in actions to carry out the purposes of the federal statutes regulating the nuclear energy industry. Section 210 provides, inter alia, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §2011, et seq.)." 42 U.S.C. §5851(a)(1)(A).

Complainant, Robert Seater, was one of several contract employees used by Respondent, Southern California Edison ("SCE"), to open a Commercial Grade Items ("CGI") test laboratory at its San Onofre Nuclear Generating Station ("SONGS"). Complainant's duties included testing commercial grade items and training others in the proper use of the laboratory's equipment.

Complainant alleges that because he filed a nuclear safety "concern" regarding the safety of certain fasteners that were tested at the CGI test laboratory for use at SONGS, he was subjected to a hostile work environment and his employment contract with Respondent was prematurely terminated on September 30, 1994. Complainant also asserts that Respondent's actions against him were part of a pattern or practice of retaliation against whistle-blowers. Respondent concedes that Complainant engaged in protected activity. However, Respondent contends that Complainant was not subjected to a hostile work environment and that his discharge was due to economic factors and to business decisions which were unrelated to his protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

On or about June 27, 1994, Complainant filed a complaint with the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor ("the Administrator"). (ALJ 2)[1] However, for reasons that are not apparent in the record, the Administrator did not forward the complaint to the appropriate district office for investigation until August 11, 1994. On September 6, 1994, Complainant filed a supplemental complaint with the Administrator. A copy of this complaint was served on Respondent by the Administrator in a letter dated September 9, 1994.

On November 30, 1994, after the Administrator's investigation, she issued a determination notice which found that Respondent had discharged Complainant because of his protected activity.[2] (C 150) On December 15, 1994, Respondent filed a timely appeal of the Administrator's determination with the Office of Administrative Law Judges. The case then was assigned to the undersigned administrative law judge.

After a series of pre-hearing orders that related to narrowing the issues and resolving questions concerning discovery, a formal

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[1] The following references will be used herein: "ALJ" for Administrative Law Judge's exhibits; "C" for Complainant's exhibits; "R" for Respondent's exhibits; and "TR" for the hearing transcript.

[2] Complainant argues that I should give the Administrator's determination precedential value. However, I give the Administrator's findings no weight because the proceeding before me is de novo. Mosbaugh v. Georgia Power Co., 90-ERA-58 (Sec'y Sept. 23, 1992).

hearing was held before me on May 9 - 11 and May 23 - 25, 1995 in San Diego, California, where the parties had full opportunity to present their witnesses, evidence, and argument.

At the close of the hearing the parties agreed that all motions to receive additional evidence would be filed on or before June 13, 1995. Neither party sought to submit additional evidence by the deadline of June 13, 1995. Therefore on June 20, 1995, I ordered the record closed.[3]

The parties have filed post-hearing briefs and responsive briefs.

This decision is based on an analysis of the record, the arguments of the parties, and the applicable law.

II. THE METHODOLOGY OF ESTABLISHING A VIOLATION

The Secretary of Labor has held that the approach to cases arising under Title VII of the Civil Rights Act of 1964 shall apply to the employee-protection provisions adjudicated by the Department of Labor. See Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983).

A. Complainant's Prima Facie Case

Complainant initially has the burden of establishing a prima facie case by a preponderance of the evidence. To prove a prima facie case, an employee must present evidence establishing each of the following elements:

(a) The employee engaged in protected activity;

(b) The employer knew that the employee engaged in protected activity;

(c) The employer took some adverse action against the employee; and

(d) The evidence is sufficient at least to raise an inference that the protected activity was the likely reason for the adverse action.

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[3] On August 24, 1995, Complainant moved for the admission of additional evidence relating to his search for employment subsequent to his termination by Respondent. (C 176) Respondent opposed the receipt of C 176. As the submission of C 176 is untimely and Complainant has failed to provide any reason why this exhibit was submitted long after the record closed, I sustain Respondent's objection to C 176.

Sellers v. Tennessee Valley Auth., 90-ERA-14 (Sec'y Apr. 18, 1991) Decisions of the OALJ and OAA, Vol. 5, No. 2, Mar.-Apr. 1991, p. 165 at 166. See also Thompson v. Tennessee Valley Auth., 89-ERA-14 (Sec'y July 19, 1993) Decisions of the OALJ and OAA, Vol. 7, No. 4, July-Aug. 1993, p. 316 at 319.

B. Respondent's Burden

Once the complainant establishes a prima facie case, the respondent employer has the burden of proffering a legitimate, nondiscriminatory reason for taking the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). See also Lockert v. U.S. Dept. of Labor, 867 F.2d 513, 519 & n. 2 (9th Cir. 1990). The Supreme Court held in St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), 125 L. Ed. 2d 407, that the employer need only produce evidence of nondiscriminatory reasons, whether ultimately persuasive or not, to rebut the presumption of intentional discrimination. St. Mary's further defined the employer's burden of production as the requirement "to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." Upon articulation of such a reason, the McDonnell Douglas/Burdine framework, with its presumptions and burdens, becomes irrelevant and the trier of fact then must decide the ultimate question of fact. Finally, however, St. Mary's makes it clear that the ultimate burden of persuasion rests with the complainant. 125 L. Ed. at 417.

C. Dual Motive Analysis

Where the employer's adverse action against the employee was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies. Dartey, slip op. at 8-9; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). In such a case, the employer has the burden to show by a preponderance of the evidence that it would have taken the same action concerning the employee even in the absence of the protected conduct. Dartey, slip op. at 9; Mt. Healthy, 429 U.S. at 287; Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion); Consolidated Edison Co. of New York v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982). The employer bears the risk that the influence of legal and illegal motives cannot be separated. Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1164 (9th Cir. 1984); Guttman v. Passaic Valley Sewerage Comm'rs, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 19, affirmed sub nom., Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474 (3d Cir. 1993).

III. STIPULATIONS

At the commencement of the formal hearing, the parties entered into the following stipulations (TR 79-80):

1. The parties are subject to the Act;

2. Complainant engaged in protected activity under the Act; and

3. Complainant acted with a good-faith belief that there was a safety issue with respect to the fasteners that were the subject of his nuclear safety concern.

IV. DISCUSSION

A. Complainant's Prima Facie Case

At the time he engaged in his protected activity, Complainant was assigned to the CGI test laboratory which was part of the Procurement Engineering Department. The CGI test laboratory was staffed by a mix of directly hired and contract employees who were sometimes referred to as "contractors." The function of the CGI test laboratory is to test the quality of certain materials that are purchased by Respondent to be used at SONGS. These materials include the fasteners that were the subject of Complainant's nuclear safety concern. "Fasteners" is a generic term that includes the nuts, bolts, screws, and the like that are used in various mechanical assemblies.

The CGI test laboratory was supervised by David Opitz. Opitz reported to Thomas Herring, III, who was supervisor of the Procurement Engineering Department. Herring in turn reported to J. T. Reilly, manager of Engineering, Construction and Fuel Services. Reilly reported to Richard M. Rosenblum, vice president of Engineering and Technical Services. Rosenblum reported to Harold B. Ray, senior vice president of the nuclear organization. (C 40, 69, 85, 153, 157, 158; R 25-29)

Complainant testified that in September 1993 he began to question the safety of fasteners and the use of a testing protocol known as "System 21" to test the quality of the fasteners that were being purchased and used by Respondent. Rather than System 21, Complainant advocated the use of the newer "System 22" method for testing these fasteners.[4] (TR 144-46, 602)

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[4] It is not necessary to determine the technical merit of Complainant's concern in order to resolve the sole issue in this case: whether Complainant was the victim of unlawful discrimination by Respondent due to his, admittedly, protected activity.

Between September 1993 and December 27, 1993, Complainant engaged in informal discussions with his superiors regarding System 21 versus System 22 testing. On December 27, 1993, Complainant formalized his concerns by engaging in two protected actions. First, Complainant bypassed at least four layers of supervisors and called the office of Harold B. Ray, the senior vice president ultimately responsible for the CGI test laboratory. Complainant did not speak to Ray personally; his call was taken by a secretary. (TR 604, 1201) Complainant testified that he took this action, "Because I wasn't getting any response from [lower levels of] management that I should be [getting] and I knew that there was a real problem here." (TR 604) Several witnesses offered uncontradicted testimony that Complainant's action of going outside the "chain-of-command" was unprecedented. (TR 309-310, 1208, 1230)

Ray testified that he recalled having received an electronic mail message from his secretary advising him that Complainant had called. (TR 1201) As a result of Complainant's call, Ray sent an electronic mail message to Rosenblum stating, "Would you find out what this guy wants? I understand he works in Procurement Engineering." (C 39; TR 604, 1204) Rosenblum informed Complainant that he would have Respondent's Nuclear Concerns Group investigate the "concern." (TR 605)

The Nuclear Concerns Group was headed by Willis Frick. Frick testified that the group consisted of seven employees who investigate employees' nuclear safety concerns. (TR 227) An employee may confidentially submit a nuclear safety concern regarding any aspect of the safety of the plant, either by telephone or in writing. (TR 882; R 41-68) The purpose of the group is to independently investigate and resolve these nuclear safety concerns. (TR 881)

After his telephone call to Ray's office, Complainant was contacted by Cheryl Adams and John Osborne, members of Respondent's Nuclear Concerns Group, and an investigation into the concern was launched. (TR 605; C 41) At the request of Adams and Osborne, Complainant engaged in his second protected action by submitting a written nuclear safety concern regarding the fasteners. (TR 605; C 41, C 156) Complainant completed Respondent's "Nuclear Safety Concern" form, describing his concern as follows (C 156):

1. Overcheck of material (fasteners) sent to the plant for installation have failed reinspection, prior to putting back in warehouse.

2. 50% of the code, QA affecting materials in the warehouse are non-conforming.

3. 60%-70% of reverse engineering nuts failed with no NCR's or follow[-]up.

4. How do modified fasteners meet ASME/ANSI standards and then what criteria for installation.

On the morning of the following day, December 28, 1993, Rosenblum reported back to Ray in the following electronic mail message:

> [Complainant] was contacted by Nuclear Safety Concerns folks yesterday and a Safety Concern initiated. I spoke to [Complainant] to ensure he was satisfied and told him [I] would stay personally involved and if at the end of the safety concerns investigation he was not satisfied to tell me. I have the NOD [Nuclear Oversight Division] folks handle this wiht (sic) kid gloves[.]

(C 39) Fifteen minutes later, after making further inquiries, Rosenblum sent a second electronic mail message to Ray with his preliminary assessment:

> Apparently we got a new machine to check fasteners and this is causing them all to show as out of spec[ification]. The machine vendor apparently warned us of this (I don't yet have details) and it has come to pass as expected. Makes one wonder why we proceeded since fasteners have been passing all other tests for quite a while and folks (except [Complainant]) don't seem to think failures are meaningful. I hope to get more details on this today.

(C 51; R 31) Rosenblum testified that in his message to Ray he was not pre-judging Complainant's nuclear safety concern but needed to "make an immediate judgment about the significance" of the concern because, "I can't imagine turning to somebody and telling them on a nuclear power plant wait a month or two months or a year before I decide whether there is any action to be taken." (TR 1044)

Steve Brown, Frick's assistant who acts in Frick's absence, testified that he was on vacation when Complainant's nuclear safety concern was filed. (TR 902) On the following day, Frick asked Brown to return from his vacation and take over the investigation of Complainant's nuclear safety concern. (TR 902; C 41) Brown's diary of the investigation was introduced into evidence. (C 41) Brown's notes reflect a flurry of activity in the days following the submission of Complainant's nuclear safety concern, including his several conversations with Complainant, Rosenblum, Frick and others. On December 30, 1993, Brown also called Respondent's outside counsel for legal advice regarding the concern.

Complainant was not acting alone. Others employed in the CGI test laboratory shared his concerns about the fasteners. While Complainant's co-workers did not file formal nuclear safety concerns, they came forward and supported Complainant's position.

For example, in a January 5, 1994 meeting with Brown and Osborne, contract employees Richard Clift and Gary Telford raised concerns similar to Complainant's. (C 41) About the same time, Frank Brewer, another contract employee, openly joined the group questioning the safety of the fasteners. (TR 890) These four individuals came to be identified by Respondent and their co-workers as the originators of the nuclear safety concern. (TR 189-90, 314, 890; C 33)

Complainant was also supported by Stanley P. Johnson, the chief executive officer of the Johnson Gage Company, the manufacturer of both System 21 and System 22. (TR 143) Johnson sold the System 22 equipment to Respondent and had traveled to SONGS in September 1993 to help explain how the system worked. (TR 146) Johnson also contacted the Nuclear Regulatory Commission ("NRC") and Respondent on several other occasions about the benefits of the proper use of System 22. (C 12, C 46-47, C 92)

On January 5, 1994, following his meeting with Complainant and his co-workers, Brown met with Rosenblum and other members of management. (C 41) Brown noted that Rosenblum "commented that the group appeared to [be] out of control in a technical sense as engineering standards were not being applied." Brown also wrote that Reilly was instructed by Rosenblum to "fix" the CGI test laboratory.

Also in attendance at Brown's January 5, 1994 meeting with Rosenblum and the others was Roger Reddy, an outside consultant. Brown wrote that Reddy was asked to provide an "outsider's evaluation" of the CGI test laboratory situation. (C 41) At the hearing Rosenblum explained why he wanted outside help:

> [W]hat we found was people were not dealing very well with each other. They were coming to contradictory results. They were not following normal procedures. There were cases in which they weren't talking to each other and exhibiting the teamwork we would normally expect from people who worked together, between different groups. (TR 1163)

Reddy surveyed employees about their suggestions and concerns and issued a report on February 18, 1994. (C 5) Reddy's report explores the relationships between the different components of the Procurement Engineering Department. The report also contains many comments about the department by unnamed employees and calls for reorganization of the department. Rosenblum testified:

> [W]e elected to put that on the back burner because we were concerned that taking the team building and reorganizing and doing some of those other things might be perceived externally as [having] a chilling effect on the work force, that we were somehow dividing the people up

> or maneuvering them together, it might be viewed negatively by the work force and so we elected to put it on hold. (TR 1168)

Following the filing of the nuclear safety concern, Herring changed his attitude toward the individuals who were involved. For example, Brewer testified, "I would say we [Brewer and Herring] could pass within six inches of each other and not even speak." (TR 255) At Brewer's going-away party in June 1994, Herring said "absolutely not one word" about Brewer's service to Respondent. (TR 269, 636) Complainant testified, "you know, he used to be really friendly with me and then I think he really got discouraged when I did that. After I submitted my concern." (TR 610) Herring denied changing his attitude toward his subordinates. (TR 1532) However, he admitted that prior to Complainant's protected activity he would go to lunch with Complainant but he had not done so after Complainant filed his nuclear safety concern. (TR 1520, 1531)

The technical investigation of the nuclear safety concern progressed. (C 41) On March 10, 1994 Complainant was told by Opitz and Herring that his annual employment contract would not be renewed and that he would be released when his contract ran out at the end of December 1994. (TR 1446, 1451-52; C 11; R 33, 116). Around this same time, all other contractors in Procurement Engineering were told that they would be released between June and December 1994.[5] (TR 89, 1446, 1667)

On April 5, 1994, a telephone conference was held between representatives of Respondent and the NRC regarding the technical merits of Complainant's concern. (C 25; R 34) In attendance for Respondent were Adams, Frick, Herring, Osborne, and four others. Notes written by Osborne following the conference call show that Respondent suspected that Complainant, Brewer, Telford, and Johnson were planning to go to Washington, D.C., to meet with Congressional staff members later in that month. (C 24)

Earlier on April 5, Rosenblum had instructed Walter Marsh, Respondent's manager of nuclear licensing to give "Tom Dennis [Vice President in Respondent's Washington, D.C., office] a full briefing and find out what committee and when they are talking to. Also need to think [how] we should be prepared to provide counter witnesses to defend ourselves, etc. Also warn NEI [Nuclear Energy Institute] (whoever is appropriate now) etc." (C 53)

Rosenblum prepared for the potential consequences from the Washington trip by Complainant and the others by sending letters to

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[5] Following this meeting, Herring reported to Rosenblum that Complainant had stated that he (Complainant) intended to inform Respondent's chairman of the board that the "contractor reductions" would jeopardize the plant's safety. (C 11)

the Institute of Nuclear Power Operations and the Nuclear Energy Institute, two nuclear industry trade associations, setting forth Respondent's position that the testing of the fasteners was adequate and the fasteners were safe. (C 48, 56) Rosenblum also participated in drafting a briefing paper for Dennis' use in the event that questions about the visit were directed to him. (C 152)

Complainant engaged in additional protected activity when he, Johnson, Brewer, and Telford went to Washington on April 15, 1994. On the morning of April 15, they met with staff members of the NRC. Later that day, they met with staff members of a Senate committee. (TR 148, 265, 614-16, 733) The topic of discussion at both meetings was the fasteners.

Johnson testified that following his trip to Washington he was called by Herring who told him, "Before you go to Congress again, be sure that you advise me first." (TR 149) Johnson described Herring's tone as one of "anger" and that his voice was raised and "unpleasant." (TR 149)

On April 22, 1994 a routine monthly meeting of the CGI test laboratory staff was held. Brewer testified that Herring told him at that time, "You don't even have the capacity to understand fasteners." (TR 256) Clift recalled Herring saying to Brewer "if he had the mental capacity to understand, he would understand how wrong he was." (TR 323) Clift added, "That to me was very offensive and that stuck in my mind, because Frank's over 70 years old, and to me, that was a direct slur on him being an older person." (TR 323) Telford also heard Herring's statement. (TR 733-36) Brewer recalled that Herring said something to Complainant about Complainant not being a mechanical engineer. (TR 260-61) Complainant responded, "I am not a mechanical engineer. I am a safety engineer licensed by the State of California." Brewer testified "I felt it was a totally intimidating or attempt at intimidation statement." (TR 261) Clift provided a similar version of this exchange. (TR 322) Brewer stated that Herring "Essentially kind of barked it out...It was very curt and terse...It was not just in normal conversation." (TR 322) Telford also heard this comment. (TR 733-36) Clift said that there were no more questions, "because we did not want to get blasted back at by [Herring]." (TR 324) Complainant said the conversation was "almost...heated" and "turned everybody off in the room." (TR 617) Telford agreed, "And after what I saw what he did to the first two, my hand stayed down. I didn't say a word after that on fasteners in the group." (TR 737)

Following the meeting, Herring telephoned Mike Ramsey, an engineer in Respondent's Safety Engineering group who was involved in investigating the concern, to tell him about the meeting. Following his telephone call with Herring, Ramsey sent an electronic mail message to Willis Frick. (C 15) Ramsey's message discusses the technical issue raised and states that a comment regarding the differences between safety engineers and mechanical

engineers was made at the meeting. Ramsey also wrote, "Tom [Herring] said that he had not used any four[-]letter words during the discussion, but it was obvious he would have liked to." Ramsey also wrote that he had instructed Herring to call Frick.

On April 25, 1994, Frick sent an electronic mail message in which he stated that Herring had called and had "express[ed] his concern that he had taken an inappropriate action." (C 13) Frick wrote that he told Herring that in his opinion Herring had done nothing wrong but Frick requested that Herring make some notes of the event. Frick noted that Herring also had called Ramsey who in turn contacted Frick. As a result of his contact with Ramsey, Frick requested that Ramsey "write up some phone notes" and survey some of the others present at the meeting.

At the request of Ramsey, Opitz also prepared a "MEMO FOR FILE" on April 26, 1994. (C 17, 18) Opitz recorded the attendance at the meeting. Herring summarized the technical discussion which had taken place at the meeting. Opitz's notes confirm that Complainant was the first to raise the fastener safety issue and that Herring responded with comments related to Complainant's background as a safety engineer versus the perspective of a mechanical engineer. (C 17)

On April 27, 1994, there was an "all-hands" meeting in the warehouse in which members of management addressed questions from members of the procurement engineering department. Complainant recalled raising the fastener issue but was told by Reilly something to the effect "that's just one engineer's opinion that there's a problem." (TR 618) In addition, Clift testified that he did not like standing for a long time and did not consider it a normal way to do business and found it "a little demeaning standing there" in the warehouse. (TR 324)

On May 15, 1994, Herring issued a memo to employees entitled, "Free Flow of Safety Information." (C 20) In the memo Herring stated that in response to the discussions at the April 22 and 27 meetings, "I want to take a moment to restate the policy of [Respondent] to encourage open, professional, technically sound, personally courteous, and objective discourse on safety issues." Herring also wrote, "the existence of a nuclear safety concern does not, in any way, reflect negatively on the individual raising the concern or on the organization from which it arises."

Following the issuance of Herring's memo, the contract employees were told that instead of being released between June and December, they would be released between June and September due to budget difficulties. Herring testified that he met with Brewer and the other contract employees on May 25, 1994 to inform them of their new release dates. (TR 1473; R 6) Herring testified that he also wanted to inform Complainant on this date but "If memory serves, [Complainant] was on vacation at this time, so...I

believe...we met with him June 2nd." (TR 1473) Complainant did not recall the exact date he learned about his early release; Herring's desk calendar confirms that he met with Complainant on June 2. (R 6)

On June 2, 1994, K.A. Slagle (head of the Nuclear Oversight Department, a part of which includes the Nuclear Concerns Group) sent identical letters to Complainant, Clift, and Telford, stating that the nuclear safety concern had been investigated and resolved. Essentially, the letter says that the fasteners were safe. (C 30-32) Although the letter addresses Complainant's written nuclear safety concern line by line, the introductory paragraph to Clift and Telford states that the basis for the letter to them was their January 5, 1994 meeting with Brown and Osborne. Clift testified that he was "very surprised" to get the letter at home and was upset that it was sent to his house. (TR 316-17) Telford was similarly upset to be contacted at home. (TR 858-64) Complainant, Clift and Telford testified that they found the technical discussion in the letter to be inadequate. (TR 308-309, 624, 759)

Telford testified that sometime later in June 1994 Opitz told him "his [Opitz's] career was ruined because of Complainant's nuclear safety concern...Management blamed him for not being able to control [Complainant]." (TR 768-69) This conversation occurred in Opitz's office. (TR 769, 831) Opitz testified, "I don't think I used those words." (TR 1692) Opitz admitted, "I felt left out" of the process to resolve the nuclear safety concern and he was feeling "frustrated" when he spoke to Telford. (TR 1694) However, Opitz denied that he was ever told by any member of management that his career was ruined. (TR 1694-95)

The June 2, 1994 letters to Complainant, Clift, and Telford did not end the fastener issue. In an electronic mail message dated June 21, 1994, Brown wrote to Frick, "Just had an extended discussion with [Ramsey] on the letter he got from one of the submitters and surrounding information. It seems we (SCE) now need to decide if it's time to cease our effort to satisfy the CGI gang and let the investigation stand on its merit or whether we want to take another shot at satisfying them." (C 33) In the same message Brown wrote, "The submitters have already played most of their cards and now seemed bent on a nonconstructive course of shutting down the plant and disrupting operations at the warehouse." Brown then requested a meeting "to pinpoint the issues and develop proposal...to close out this issue."

On July 4, 1994, Rosenblum sent an electronic mail message to Ray. (C 55) Rosenblum wrote, "the fastener issue is far from dead. We feel fairly confident that our existing technical analysis is as thorough as necessary and are constantly upgrading it to respond to new issues raised..." Rosenblum continued:

> The contractor layoffs have been on the books since the beginning of the year and have been visible for several months. We accelerated some a few months, due to the work situation, but kept [Complainant] (the original alleger) at the original date as a measure of protection to avoid any perception of retribution for raising [nuclear safety] concerns. (C 55)

During the remainder of July and August, events seem to have taken a summer hiatus. Then, in early September, Telford was involved in a confrontation with a co-worker, Wendy Murray. Telford testified that Murray "really got into a turmoil one day, she accused me of trying to shut the plant down, might as well go home, we're all going to get laid off. She was yelling at the top of her voice and throwing things around." (TR 724)

On September 8, 1994, Complainant, Clift, and Telford attended a meeting regarding a forthcoming NRC visit to the plant. As the attendees were filing into the room, Jim McKeown, a quality control inspector, pointed to Clift, Telford, and Complainant and said "there's the troublemakers." (TR 333, 739) Brown and Adams also were in attendance but apparently did not hear the remark or react to it. (TR 333-34, 621-22, 740, 919) Clift said he was not frightened by McKeown's statement and did not bring it to anyone's attention because he did not think management would do anything about it. (TR 367-369) Telford testified he did not "feel good at all because I didn't like being singled out. I was already going through retaliation and intimidation with the company so I didn't need that." (TR 741)[6] Benaj Basu was also in attendance at this meeting and heard McKeown's comment. (TR 1849) Basu testified, "I thought he was joking, and that's the way he does. I know McKeown. That's the way I heard it. It was a joking manner." (TR 1849) Daniel J. Czapski similarly stated, "I felt that he made it, knowing Mr. McKeown, having worked with him for a couple of years, I believe it was a relatively flippant remark, in jest." (TR 1874)

At a September 21, 1994 meeting, Complainant and Telford heard McKeown remark, "It's all their fault." (TR 675, 743) Czapski heard this remark too. (TR 1876) He testified, "Again, I believe...that it was a jovial type of remark." (TR 1876)

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[6] There also may have been comments made at this meeting by a co-worker named Paulson about "guys in white hats vs. guys in black hats." (TR 744) However, the recollections of witnesses to this incident were too vague to find with certainty that this comment was made. In fact, Complainant himself offered conflicting testimony on this point. Initially he testified that "black hats" were management and the "white hats" were the workers. (TR 673) Later, Complainant testified that the "black hats" were the workers while the "white hats" were management. (TR 674)

Complainant's last day of employment with Respondent was September 23, 1994, but he was paid for five vacation days through September 30, 1994. (TR 636; C 6, C 42)

In November 1994, approximately two months after Complainant's departure, Respondent began to implement some of Reddy's recommendations and the Procurement Engineering Department was transferred to the Quality Assurance Organization. (TR 1542) This transfer effectively removed Herring as the manager of the Procurement Engineering Department and the CGI test laboratory. (TR 1542)

Complainant testified that he has not worked since being released by Respondent. (TR 636) He has applied for about 125 jobs but has had no offers. (TR 636-37) Complainant further testified that his health is "not too good...My blood sugar goes up and down and every once in a while I need to eat something to keep my blood sugar up and I get sluggish and this whole thing has bothered me mentally, this whole issue that I'm undergoing right now because I feel responsible for some of these people." (TR 643)

Clift and Telford testified that they would never submit a nuclear safety concern again. (TR 352, 760) Clift further testified that Complainant is not happy any more and "He's just not the same guy." (TR 354) Telford agreed, "[Complainant] has been looking really bad lately. He doesn't look anything like he used to. His hair has really grayed over more. He hasn't been --- he's been uptight and withdrawn. He's not the Bob Seater I've seen at work." (TR 870)

Complainant's prima facie case of discrimination can be summarized as follows: After filing a nuclear safety concern with Respondent on December 27, 1993, Complainant was informed on March 10, 1994 that he would no longer be employed by Respondent as a contract employee after December 1994. After pursuing his concern further by travelling to Washington, D.C. on April 15, 1994 to meet with staff members of the NRC and the staff of a Congressional committee, Complainant was told on June 2, 1994 that his release date had been moved up to sometime in September 1994.

I find that Complainant has established a prima facie case of discrimination. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). This finding is based on the following facts: 1) Respondent has stipulated that Complainant's conduct constitutes protected activity; 2) Respondent does not dispute it knew that Complainant engaged in the protected activity; 3) Respondent took adverse action against Complainant when it informed him that he would be released as a contract employee and, later, when the release date was accelerated from December to September 1994; and 4) the timing of the adverse actions —— Respondent's notification that Complainant would be discharged occurred less than three months after he submitted the nuclear safety concerns, and Complainant's

continuing protected activity was quickly followed by the acceleration of his release from December to September 1994. The foregoing circumstances raise the inference that Respondent's actions against Complainant were motivated by his protected activity.

On the other hand, not all of the evidence introduced by Complainant supports his prima facie case. For example, Complainant argues that Brown's December 30, 1993 telephone call to Respondent's outside counsel is evidence of improper animus. Without divulging the substance of the call, Brown testified that the attorney offered "preliminary regulatory advice." (TR 905) Although Brown testified that calls were placed to outside counsel in "very few" cases (TR 904), I find that such conduct does not constitute evidence of unlawful animus.

Another of Complainant's allegations I do not accept is that the transfer of the Procurement Engineering Department from Herring's control is evidence of improper animus. Herring testified that he was "confident" that the transfer was not the result of Complainant's protected activities. (TR 1542) Herring added:

> I have received nothing but 100 percent reinforcement of this with Mr. Reilly and Mr. Rosenblum. I'm really very confident on (sic?) my management on this issue. I have no fear at all that there will be some sort of action taken against me because someone in my organization submitted a nuclear safety concern. I'm very, very confident of that.

(TR 540) Complainant has introduced no evidence to contradict Herring's testimony that the transfer was done "according to plan." (TR 1542)

I further find that Complainant has not established a prima facie case that he was subjected to a hostile work environment. The Secretary has recognized that the Act protects an employee from being exposed to a hostile work environment as a result of his or her protected activity. English v. General Dynamics Corp., 85-ERA-2 (Sec'y Feb. 13, 1992). The Supreme Court has observed, "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." Harris v. Forklift Sys., Inc., 114 S. Ct. 367, , 126 L. Ed. 2d 295, 302 (1993). The harassment complained of must relate to the "terms, conditions, or privileges" of employment. Kotcher v. Rosa and Sullivan Appliance Ctr. Inc., 957 F.2d 59, 62 (2nd Cir. 1992) (citing 42 U.S.C. §2000e-2(a)(1)). Moreover, "The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief." Id. (citing Carrerro v. New York City Hous. Auth., 890 F.2d 569, 577 (2nd Cir. 1989)).

To support his claim of a hostile work environment, Complainant introduced evidence of remarks make by McKeown, one of his co-workers, towards him and his fellow "submitters" at two separate meetings. There is no evidence that Respondent had any knowledge of, or condoned, these remarks. In fact, Brown testified he did not hear Mr. McKeown's remarks but would have reacted to them if he had heard them. (TR 919) Others who heard these remarks understood that they were made in jest.

Murray's September 1994 outburst in Telford's presence is the only co-worker incident Complainant was able to conclusively demonstrate that Respondent was aware of. However, this incident did not involve Complainant nor did he testify that he was affected by it. Furthermore, Opitz testified that he counseled Murray after her outburst. (TR 1702-03)[7]

While McKeown's comments and Murray's outburst were inappropriate, they do not rise to the level of creating a hostile work environment as contemplated by the Supreme Court. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)(citing Rogers v. EEOC,454 F.2d 234, 238 (5th Cir. 1971, cert. denied, 406 U.S. 957 (1972)(mere "offensive utterance" insufficient to state a claim for a hostile work environment)). Accord, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994). Therefore, I find that these isolated incidents did not create a hostile work environment and are not attributable to Respondent.

It is understandable that Brewer, Clift and Telford considered Herring's comments during the April 22, 1994 meeting to be offensive. Indeed, Herring was concerned enough about his remarks to call Frick immediately after the meeting to alert him that the meeting had been volatile. However, Herring's comments and general attitude during the course of 1994, although certainly unpleasant for Complainant and his fellow submitters, do not rise to the level of creating a hostile work environment. Likewise, having to stand for a few hours at the April 27, 1994 all-hands meeting, even if considered an oppressive act, does not create a hostile work place. See King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) ("Although a single act can be enough,...generally, repeated

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[7] David Axline's conclusion that "This is one area where we might have some [legal] exposure" does not make it so. (C 26, date and time: 9/13/94 1:31 PM) It is apparent from Axline's message that he was primarily concerned with the Murray incident which, as Opitz stated, had been addressed and "noted in the worker's [Murray's] mid-term performance appraisal." Axline added that Herring stated, "this was the only such incident that he knew about." This type of remedial action by Respondent would be relevant in the event Complainant was able to establish a prima facie case of a hostile work environment and could serve to relieve Respondent of liability. Kotcher, 957 F.2d at 65.

incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."); Carr v. Allison Gas Turbine Div., General Motors, 32 F.3d 1007, 1010 (7th Cir. 1994)(requiring "more aggressive affronts than mere words.").

Other evidence introduced by Complainant is difficult to assign either to the wrongful discharge or to the hostile work environment claims. For example, Complainant introduced testimony that following his deposition in March 1995, some six months after Complainant left his position with Respondent, Opitz removed a sign in the CGI test laboratory that stated "principle above politics." (TR 1704-10; C 67) Similarly, a letter from the NRC was circulated by Herring in January 1995 with the notation "copy all pe" and a doodle of a smiling face. (C 7) Like the "principle above politics" incident, Complainant has not demonstrated how an event that occurred almost four months after Complainant left his position is relevant.[8]

Taken as a whole, I find that the isolated and unconnected incidents cited by Complainant were not frequent or severe enough to establish a prima facie case that Complainant was exposed to a hostile work environment.

Finally, we come to Complainant's contention that his treatment by Respondent was part of a pattern or practice of retaliation against whistle-blowers. In support of this allegation, Complainant introduced the testimony of Addison DuBoi and Clift. DuBoi testified that he believes Respondent transferred him because he submitted a Nuclear Safety Concern on July 30, 1990. (TR 1962) DuBoi had difficultly recalling the exact details of the events that followed the filing of his concern. He cautioned, "One thing before I start this, I'd just say, this has been several years for me and some of the things are somewhat foggy." (TR 1962-63) DuBoi testified that he believes that he was transferred as a result of his nuclear safety concern, but he provided no evidence to support his claim. (TR 1985-86)

Clift testified that in addition to his concern about the fasteners, in September 1994 he filed a separate nuclear safety

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[8] One of Complainant's allegations is wholly unsupported: that he was subjected to illegal surveillance by Respondent. The record contains only statements that Complainant and some of his colleagues had the "gut instinct" that improper electronic surveillance was going on. The evidence that video cameras were used by Respondent does not establish that there was illegal surveillance. (C 89: videotape of CGI test laboratory inspection; R 98: documentation of MESA Access Control System that states "No camera's (sic) will be located to where they are monitoring specific personnel/work activities.")

concern related to "relays". (TR 345-51) Clift testified that management's reaction to the relay concern was similar to its reaction to the fastener concern, "they tended to try to argue with us when we were at a meeting, and tell us everything was really all right and we didn't know what we were talking about." (TR 350-51) I find that Respondent's disagreement with Clift does not by itself indicate a discriminatory animus. Further, despite having been associated with two nuclear safety concerns within one year, Clift continues to be employed in the laboratory. (TR 365)

Complainant has produced insufficient evidence to establish, prima facie, that Respondent's treatment of other whistle-blowers was unlawful, let alone that it constitutes a pattern or practice, or a common design, to discriminate against whistle-blowers. Therefore, Complainant has not shown by prima facie evidence that Respondent's actions against him were part of such a pattern or practice.

Since I have found that Complainant has established a prima facie case of unlawful discrimination under the Act, the burden is shifted to Respondent to proffer a legitimate, nondiscriminatory reason for its adverse action against Complainant.

B. Respondent's Legitimate, Nondiscriminatory Reason for Complainant's Discharge

Respondent posits that its legitimate, nondiscriminatory reason for releasing Complainant from his contract position had its origin in the shutdown of one of its three nuclear power generating units at SONGS. As a result of this shutdown, the hundreds of full-time employees of Unit 1 were told that they would be transferred to positions located elsewhere at SONGS. In many cases these positions were held by contract personnel, including Complainant. Respondent further argues that Complainant's position at the CGI test laboratory was temporary and would have been eliminated even had Unit 1 not been shut down. Respondent alleges that it reached its initial determination to release Complainant by December 1994 prior to his protected activity. However, subsequent to Complainant's protected activity, budget pressures forced Complainant's release date to be accelerated to September 1994. As further evidence that there was no relationship between Complainant's discharge and his protected activity, Respondent alleges that it was because of his protected activity that Complainant was spared from an even earlier termination.

Rosenblum testified that the CGI test laboratory was opened in 1991 in order for Respondent to upgrade its capability to analyze and test commercial grade materials, including fasteners. (TR 991; C 144) Responsibility for the CGI test laboratory was placed in the Procurement Engineering Department under Herring. (C 158)

Rosenblum testified that in general the labor force at SONGS

is a mix of directly hired employees and contract employees. (TR 993) The exact composition of this labor force has varied depending on the needs of Respondent's operations. Rosenblum testified that, like the plant in general, the CGI test laboratory initially was staffed with a mix of directly hired employees and contract personnel. (TR 992) However, Rosenblum stated that Respondent's long-term goal was to staff the laboratory wholly with Respondent's own directly hired employees and to replace the contract personnel. This goal was motivated by a number of factors, including the lower cost of directly hired personnel.

Complainant was one of several contract employees hired by Respondent to open the CGI test laboratory. While Complainant had been a contract employee at the time he engaged in his protected activity, this had not always been the case. For approximately five and a half years, between 1985 and 1991, Complainant had been a direct employee of Respondent. However, as a result of his father's illness, in early 1991 Complainant resigned his position at SONGS and planned to relocate. (TR 595-96) For reasons that are not apparent in the record, Complainant did not move, and he was engaged by Respondent to assist in opening the CGI test laboratory starting in June 1991 as a contractor. (TR 596; C 6)

Complainant's services were secured through the use of Premier Temporary Services ("Premier"), which is not affiliated with Respondent. Complainant testified that Respondent submitted a purchase order to Premier to supply a specific employee or employees to work at SONGS. Complainant submitted his time cards to Premier. Premier periodically billed Respondent for Complainant's time. And Premier paid Complainant's salary. (TR 638-642)

The purchase order that governed Complainant's employment refers to a document titled "General Terms and Conditions [-] Supplementary Personnel." (R 1-3) This document provides that any contract employee, or the entire purchase order, may be terminated by Respondent at any time upon written notice to Premier.

Long before Complainant engaged in his protected activity, Respondent was forced to examine its overall relationship with its contract employees. Rosenblum testified:

> In early 1992, as a result of activities with the California Public Utilities Commission, we agreed to shut down San Onofre Unit 1 when the fuel that was at that time in the plant ran out. And there are three units at San Onofre, so nominally we were going to eliminate one of the three. And that made available a large staff of skilled people who worked on Unit 1. We elected to absorb those people into the work force in a transition as we shut down the unit and displaced contractor personnel that could be displaced and for which we had jobs, they could be retrained to do those jobs.

(TR 994; see also R 30: January 16, 1992, "Special Information Release" signed by Harold B. Ray to Nuclear Organization Employees announcing shut down of Unit 1 and plan to relocate displaced employees elsewhere).

In an August 19, 1992 electronic mail message, Bill Davidson wrote "I have been tasked with establishing non-SCE staffing reduction targets for each Division." (R 89) Davidson further wrote, "We are still trying to sort out the data that was provided by the Finance Team to determine how many people those dollar reductions equate to...My belief is that we...are still talking about 300-400 people and instead of being at year-end, we may have to start sooner."

Respondent's pending shutdown of Unit 1 was responsible, in part, for an "Open Letter" addressed to "Fellow Employees" dated August 25, 1992 and signed by John E. Bryson, Respondent's Chairman of the Board. (R 24) In his open letter Bryson wrote:

> I have asked the Finance Team to take the necessary steps to reduce 1992 expenditures by at least $15 million by year end. Specific actions will include substantial reductions in expenditures for consulting services, part-time, temporary and supplemental personnel and a company-wide hiring freeze effective immediately...[W]e expect continued difficulties in reducing the appropriate [spending] levels for 1993 and 1994.

Rosenblum testified that as part of the plan to transfer employees from the closed Unit 1 to other positions at SONGS, two studies were commissioned to determine the ideal staffing levels at SONGS. (TR 1010) One study was conducted by Tim D. Martin, an outside consultant, in early to mid-1993. This study became known as the "TDM study." The second study was conducted in-house in June 1993 by Brian Katz, and was referred to as the "BK study." (TR 1011, 1014; R 19)

Reilly testified that he was familiar with the program to reduce the number of contract employees at SONGS due to the shutdown of Unit 1 and that, apart from that reduction, the plan had been to eventually reduce the number of contract employees in the CGI test laboratory. Reilly testified that the BK study called for a staffing level of thirty and the elimination of all contract employees in Procurement Engineering by the end of 1994. (TR 1275, 1278, 1311) Rosenblum explained that the BK study proposed a staffing level for the Procurement Engineering Department of thirty people. However, at the time of the study, the staffing level in Procurement Engineering was "about ten to twelve people higher than that." (TR 1014) The TDM study proposed the same staffing levels. As a result of these studies, Rosenblum explained, "We would have been shooting for procurement engineering to reach thirty at the

end of 1994." (TR 1022)

Rosenblum testified that he directed his staff "to use that [BK] study as a staffing level and to create contractor reduction schedules and provide them to me." (TR 1025) Herring testified that he knew that under the BK study staffing levels he would be required to release all contract personnel, including Complainant, by the end of 1994. (TR 1443-44, 1452)

The Procurement Engineering budget for 1994 was set at 92.1% of the 1993 budget. (R 17, dated 1/4/94) This budget projected cost savings, in part, through the elimination of eleven contract employees. Earlier versions of this budget called for spending that was 90.0%, 90.8%, and 93.5% of the 1993 budget level, in part accomplished through the elimination of contractors. (R 7 & 8, dated 8/19/93; R 9, dated 11/1/93; R 15 & 16, dated 12/9/93).

In a memorandum dated January 5, 1994, Herring informed Rosenblum and Reilly that he could meet the "Target = 30 Total" by releasing all contract personnel by December 1994. (R 10) Herring's memorandum identified twelve contract employees who would be released during 1994. The earliest was scheduled to be released in January. The last, a group of five including Complainant, was to be released in December.

On March 3, 1994, Herring sent a second memorandum to Rosenblum and Reilly advising that one contract employee had been released in January. All other contract employee release dates remained unchanged. (R 11)

David Hadley testified that his duties included keeping the budget figures for the Procurement Engineering Department. (TR 403, 442) In a March 7, 1994 memorandum, Hadley informed Herring that the department was overspending its budget by $97,872 and projected a deficit of $176,374 by the end of the year. (R 104)

Herring testified that he had been requesting permission from his superiors to inform the contract employees that they were scheduled to be released. (TR 1446) Eventually permission was granted, and during the week of March 8, 1994 Complainant and several other contract employees were informed by Herring and Opitz that they would be released between June and December 1994. (TR 1667; R 11, 33, 116)

Garret H. Dokter, Jr., testified that he is a budget analyst for Respondent and is responsible for monitoring the Procurement Engineering budget. Dokter testified that by the end of March 1993 the Procurement Engineering budget was running a current deficit of $134,000. (TR 1773-74) Dokter further testified that the budget deficit continued to grow throughout the remainder of 1994. (TR 1774-75; R 18)

Dokter testified that during 1994 his budget figures did not always agree with Hadley's calculations due to differences in their accounting methods. (TR 1781-1816) However, Dokter testified that his budget was based on the company's records and was the budget that agreed with the corporate records. (TR 1754; R 73-84) Despite their differences, Dokter and Hadley were in agreement that in the early months of 1994 the Procurement Engineering Department was running a deficit that was projected to increase if left unchecked. (TR 517)

Hadley's report to Herring dated April 4, 1994, listed a current deficit of $98,805 and projected a year-end deficit of $173,315. (R 105) While that report contained a current deficit that was larger than that contained in the March report, this deficit projection was approximately $3,000 lower than Hadley's year-end deficit projection prepared in March. Dokter's report for the same period projected a $167,506 deficit by the end of the year. (R 76)

On April 29, 1994, Herring sent a third memorandum to Rosenblum and Reilly setting forth revised contractor release dates. (R 12) Under this revised schedule, Complainant and the four others to be released in December had their release dates changed to September 1994. The memorandum stated that the termination dates were "Revised due to budget shortfall."

Following the release of some of the contract employees and the new release dates of the remaining contract employees, Hadley's May 2, 1994 report noted a smaller current deficit of $87,708 and a year-end budget <u>surplus</u> of $166,075. (R 106) Hadley testified (TR 511):

> A. The reason why the projection now shows a surplus is because the computer code that I had developed to calculate this projection was revised to reflect the early departure or release of contractors and based on the release dates that we knew of at this point in time.
>
> Q. So that took into account the fact that the contractor personnel were going to be released and it resulted in going from a fairly substantial deficit to a surplus, correct?
>
> A. That's correct.
>
> Q. So by releasing that personnel, it solved the budget problem, as far as your budget projection showed, correct?
>
> A. Yes.

Although the Procurement Engineering Department was cutting its budget to such a large extent that it was projecting a surplus, other departments were experiencing budget problems. In a June 9, 1994 letter addressed to "Nuclear Organization SCE Personnel", Ray wrote that the transition of Unit 1 personnel to positions in Units 2 and 3 had been "successfully completed over the past year..." Ray added, "Our transition plan has included a significant reduction in the level of contractor support...and this reduction will continue. However, it is also necessary for us to now reduce the current level of SCE staffing by 45 management and administrative employees and 16 bargaining unit employees." (R 23)

Despite continuing budget pressures, Complainant was spared from an even earlier termination. In a June 22, 1994 electronic mail message from Rosenblum to Ray, Rosenblum wrote: "FYI, [Reilly] also told me that [Complainant] (the originator of the bolting concern) was originally scheduled to leave late in the year but because of budget cash flow issues contractor reduction in this area is being accelerated. [Reilly] was seeking input on what to do with [Complainant]. I told him to keep him until the scheduled date so we avoid the appearance of some adverse change." (C 2)

Four hours later on June 22, 1994, Reilly followed his conversation with Rosenblum by sending an electronic mail message to Herring. (C 166; R 39) Reilly wrote:

> In response to our Budget discussion. I talked to [Rosenblum] about the current forecast and the impact of originally scheduled contractor reduction. I told him we had concluded we need to move the contractor reduction schedule forward to July to achieve our budget objectives. I indicated I was concerned about the perception the work force might have as a result of moving [Complainant's] scheduled date forward. We agreed that we should not change [Complainant's] schedule date. It is more important to maintain respect for the concern process and that the small budget improvement that would result did not justify any change. Therefore please move the contractor reductions forward to July as we discussed with the exception of [Complainant's]. [Complainant's] release date should remain 9/31/94 as originally scheduled.

Rosenblum testified (TR 1031):

> I elected to freeze [Complainant's] date and not make any further changes at that time because he had raised a nuclear safety concern and I wanted to clearly communicate that there was no action here associated with the nuclear safety concern so that it would not appear to people outside that any action had been taken on him that would prevent them from also raising safety concerns.

The budget pressure on the Procurement Engineering Department continued into July. (C 78; R 72) In an electronic mail message dated July 1, 1994, Dokter wrote: "Reilly is committing to the Nuclear Organization that he will be on budget at year end." However, Dokter testified:

> The entire nuclear organization was under budget pressure during the year. Mr. Reilly had been instructed to do everything he could to stay within his budget and he was also instructed to absorb new issues that came up during the year. There was considerable pressure to contain the costs throughout the whole nuclear organization.

(TR 1776) Dokter explained "the biggest single [new issue was] about a million dollars worth of canceled capital projects." (TR 1777; see also TR 1299 (Reilly)) Dokter's memorandum shows that Procurement Engineering's "impact" was to "be $100K under budget." (TR 1302)

After being instructed not to advance Complainant's release date, Herring continued to accelerate the release of other contract personnel. (R 13) In a memorandum dated July 11, 1994, Herring informed Rosenblum and Reilly that Lowe and Outlaw had been released and that all other contractor release dates had been moved to July. This group of contractors included the four originally scheduled to be released in December along with Complainant. However, Complainant remained scheduled to be released in September. Like the April 29, 1994 memorandum, the contractor release dates were noted as "Revised due to budget shortfall."

By August 1, 1994, Complainant was the last remaining contract employee not only in the CGI test laboratory but in the entire Procurement Engineering Department. (R 14) Complainant's last day of employment was September 23, 1994.

Despite the budget cuts and the elimination of all contract employees, Dokter testified that Procurement Engineering finished 1994 with a budget deficit of $5,817.00. (TR 1776) Reilly testified that the department as a whole was unable to meet its budget and ended the year more than one million dollars over budget. (TR 1303)

The foregoing circumstances support Respondent's contention that it had a legitimate nondiscriminatory reason for terminating Complainant, viz., its plan to eliminate the contract personnel which was motivated by financial considerations. The Supreme Court has noted that at this stage the fact-finder shall not make a "credibility assessment" of Respondent's proffered reason. St. Mary's, 113 S. Ct. at , 124 L. Ed. 2d at 416. In the words of St. Mary's, I find that, "By producing evidence (whether ultimately

persuasive or not) of nondiscriminatory reasons," Respondent has "sustained [its] burden of production, [and] thus placed [itself] in a 'better position than if [it] had remained silent'" Id.

Therefore, the applicable presumptions have dropped out and the record must be considered as a whole in order to determine whether Complainant has satisfied his ultimate burden of proof.

C. Complainant's Ultimate Burden

In response to Respondent's contention that Complainant's termination was due to budget considerations rather than retaliation for his protected activities, Complainant argues that the budget problems were deliberately created by Respondent so that it could discharge him. To prove this point, Complainant alleges that money was actually available in the budget to pay him through the end of the year but was hidden through Respondent's manipulation of the budget.

To support his contention that the budget was intentionally altered, Complainant relies on the testimony of Hadley who stated that three new accounting codes were created in the Procurement Engineering budget after Complainant filed his nuclear safety concern on December 27, 1993. (TR 451, 496) Respondent contends that these budget codes were created to cover destructive testing, supply expense activities, and "NEDO" support. Complainant argues that these budget changes were made in response to his protected activity, in order to manipulate the Procurement Engineering budget. However, Hadley's testimony is contradicted by the evidence submitted by Respondent. An August 30, 1993 memorandum from Leroy Rice to Herring states that Procurement Engineering will have to budget for destructive testing because funding for this activity will no longer be provided by "material support." (R 103, R 111) Another August 30, 1993 memorandum from Dokter to Rice discusses the same topic. (R 114) In a December 17, 1993 electronic mail message Hadley himself wrote that new budget codes would have to be created to track these new budget items. (TR 501-02; R 102) Dokter testified that the decision to add a budget item for destructive testing was made in early September 1993. (TR 1767) Contrary to Complainant's contention, I find that Dokter did not present an "arrogant, pompous demeanor." (Complainant's post-hearing brief, p. 46) I also reject Complainant's attempt to demonstrate bias on Dokter's part because he owns $40,000 in Respondent's stock and "knows where his bread is buttered." (TR 1824; Complainant's post-hearing brief, p. 47, n. 9) Based on Dokter's credible testimony and the documentary evidence, I find that Respondent's use of the new budget codes was unrelated to Complainant's protected activity.

Complainant also alleges that the large discrepancy between Hadley's end-of-year 1994 budget estimates and Dokter's budget estimates is further evidence of budget manipulation. Hadley

explained that in preparing his reports he calculated the contract employees' labor rates by multiplying the hourly wage times the number of hours worked. (TR 523) Hadley did not account for payroll taxes and did not know who paid them. (TR 524) Hadley also failed to account for paid vacations because he had been unaware that they were provided by Respondent. (TR 530)

Dokter testified he was aware that his budget estimates and Hadley's were divergent. By December 16, 1994 their estimates were $181,124 apart. (R 115) At the end of 1994, Hadley requested that Dokter account for the differences, but Dokter did not do so. Dokter testified he was busy with "other priorities." (TR 1791-92) However, in connection with this litigation, Dokter finally attempted to reconcile the figures. (TR 1809-10) In his reconciliation, Dokter identified a series of errors made by Hadley. (R 116) For example, Hadley used the wrong billing rate for the contract employees. (TR 1794) Dokter observed, "In one case the rate was simply rounded to the nearest whole dollars instead of dollars and cents. In other cases, the rate changed." (TR 1794) Other mistakes made by Hadley included failing to account for paid vacations and payroll taxes. (TR 1795) Dokter was able to account for all but a small fraction of the differences between his report and Hadley's.

In addition, Hadley himself conceded he had never seen any evidence that the budget was changed to deprive Complainant of his position. (TR 534)

Based on the foregoing, I find Complainant has not established that Respondent manufactured or manipulated its budget figures. Therefore, I reject this modality of refuting Respondent's proffered nondiscriminatory motive.

Complainant also argues that Respondent's business-decision defense is pretextual because the release of Complainant was contrary to good business judgment. Complainant bases this contention on the claim that at the time he was released there remained training of personnel to complete, and therefore the CGI test laboratory's ability to fully function was compromised by his termination. However, Herring testified that when Complainant left, there remained employees who had attained the same level of training possessed by Complainant. (TR 1482) Complainant acknowledged that he had trained directly-hired employees to the same level of qualification that he possessed, but Complainant stated he would have preferred additional time to train his replacement. (TR 660-63, 705) The certification records maintained by Respondent show that after Complainant's termination there remained employees able to perform all the job functions formerly performed by Complainant. (R 96-97, 99-100) As Herring testified, Complainant's function was to "work yourself out of a job" by training Respondent's direct employees to replace him. (TR 1483) Therefore, even though there may have been functions that

Complainant could have continued to perform, there is no evidence that Respondent had a need to retain Complainant to perform these functions.

Complainant further contends that an inference of animus may be drawn from Respondent's decision not to seek outside work for the CGI test laboratory which would have provided a revenue source for his salary. With respect to this issue, Herring testified that "one of my great hopes" was to have the CGI test laboratory "doing work for others than the Southern California Edison." (TR 1555) Herring testified that the plan was scuttled after speaking to a company lawyer who told him, "don't hold out much hope." (TR 1554-55) Herring recalled, "he ran through [t]his long scenario of stories on why liability was such an awful issue." (TR 1555) Herring continued, "It was just this mountain of ... legal garbage that got in the way." (TR 1557) Herring added, "It's a test of how economical is it, how much money would it make, and we didn't meet their test. It didn't even come close." (TR 1557) I find that Complainant has failed to establish that Respondent had an improper motive in rejecting the idea that the CGI test laboratory perform work for other companies.

To sum up, I find the evidence establishes that Respondent had determined in mid-1993, based on the BK study which was issued prior to Complainant's protected activity, that the Procurement Engineering staff would be reduced to thirty full-time employees by eliminating the ten or twelve contract personnel in that department. The Procurement Engineering budget for 1994, which also was developed prior to Complainant's protected activity, was set at a level lower than the 1993 budget. And it was anticipated that the cost-savings between the 1993 and 1994 budgets would be achieved through the elimination of all contract personnel. Complainant himself testified he was aware of Respondent's plan to transfer displaced Unit 1 employees to other positions at SONGS. (TR 657) Complainant also testified he was aware that the positions made available to Unit 1 employees would be at the cost of other contract personnel. (TR 658)

Complainant also alleges that Respondent accelerated his release from December 1994 to September 1994 because of his protected activity.

In the first few months of 1994, although Dokter's and Hadley's figures did not always agree, they both projected a six-figure budget deficit for the Procurement Engineering Department if spending remained at its current level. Herring testified that contract employees were "the only real variable I had in my budget to address my emergent budget items." (TR 1457) Therefore, Respondent accelerated the release date of its contract employees in the Procurement Engineering Department. Then, in late June, Respondent decided that the small cost savings that could be achieved by releasing Complainant were offset by its desire to

maintain the integrity of the nuclear concerns program. However, even after deciding in late June that Complainant's release date would not be changed again, Respondent revised its contract employee release schedule in July. Thereafter, contract employees and direct employees continued to be released from their employment. Complainant was the last contract employee to be released from the Procurement Engineering Department.

The strongest evidence of unlawful animus towards Complainant is Herring's attitude toward his subordinates after Complainant filed his nuclear safety concern and Herring's conduct at the April 22, 1994 meeting. However, although it is clear that Herring was personally displeased with Complainant, there is insufficient evidence that Herring or anyone else in authority at Respondent took any action against Complainant because of his protected activity.

Complainant argues that additional evidence of Herring's improper animus is his failure to mark "favorable" or "unfavorable" on his "Termination/Change of Status Notification." (C 4) However, Herring testified that he forgot to mark the box but "I would have checked favorable if I'd remembered to do so." (TR 1528) Herring also testified, "he's a good man. He did a lot of good work for us." (TR 1483) I find that Herring's testimony is credible on this point. Therefore, I find Herring's failure to mark "favorable" or "unfavorable" on this form is not evidence of improper animus.

Complainant further alleges that Herring's failure to check favorable or unfavorable is an attempt at post-employment discrimination. However, it is unclear from the record if this document is shown to third-parties or is intended for internal use only. Moreover, Complainant has not introduced any evidence that demonstrates that Herring's failure to mark this particular box had, or has the potential to have, any discriminatory impact on Complainant's efforts to secure other employment.

Complainant's remaining arguments that the evidence establishes unlawful animus are also wanting.

Complainant argues that Rosenblum's assurance to Ray that Complainant's nuclear safety concern would be "handle[d]...with kid gloves" is evidence of unlawful animus towards Complainant. (C 39) Complainant cites the first, literal, definition of "kid gloves" as gloves made out of a goat's skin. (C 145 - Oxford English Dictionary) Although Rosenblum could not offer an exact reason why he chose to use the phrase "handle with kid gloves" in his message to Ray (TR 1041-42), in common parlance the term connotes that the subject should be treated carefully or gently. Therefore, I find this message does not indicate that Respondent acted with improper animus towards Complainant.

Another example of a misinterpreted incident relates to Opitz's comment to Telford that his own career was ruined. While

I do not credit Opitz's denial that he made this comment, there is no evidence that Opitz literally believed that his career was ruined. Moreover, there is no evidence that Opitz's comments were ever communicated to Complainant. Even if this comment was somehow construed to be evidence of improper animus, it could not have impacted on Complainant's employment situation because this conversation occurred several weeks after the decision was made to release Complainant in September and no further action was taken against him following Opitz's comment. Finally, the record establishes that subsequently Opitz was not treated adversely by Respondent. Rather, in November 1994 Opitz was promoted and given responsibility over a staff performing quality control of received materials, in addition to his supervision of the CGI laboratory staff. (TR 1660)

Brown's June 21, 1994 electronic mail message to Frick contains comments that indicate his antagonism toward Complainant and the other submitters. (C 33) In his message Brown refers to the submitters as a "gang" that was "bent" on shutting down the plant. Brown stated that he uses the word "gang" to talk about his family, a work group, or his T-ball team. (TR 900) Brown also testified that his use of the word "bent" was neutral in tone. (TR 895) I do not credit Brown's denial that his statements reveal his displeasure with Complainant and the other submitters.[9] However, the decisions to discharge Complainant were made by Rosenblum, Reilly, Herring, and Opitz, and there is no evidence that Brown's remarks were known to or heeded by any of those individuals. Moreover, the day after the June 21, 1994 memorandum was written, Reilly made the decision not to subject Complainant to any further acceleration of his release date, even though the release date of the other contractors was moved from September to July. At the hearing, Reilly testified that Brown's comments were "ludicrous." Reilly also stated, "There's no way this issue was going to shut down the power plant." (TR 1361) Herring testified that he did not believe Complainant intended to shut down the plant because of his nuclear safety concern. (TR 1578-79) I find that Brown's antagonistic attitude toward Complainant is insufficient to indicate that Respondent had an unlawful motive in discharging Complainant.

For all of the reasons set forth above, I find Complainant has failed to establish by a preponderance of the evidence that Respondent's decisions to discharge him and to move his termination to an earlier date than it was originally scheduled were motivated

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[9] Contrary to Complainant's contention, I find that the training materials Brown used do not indicate animosity against whistle-blowers. The training materials accurately describe the rights and protections of whistle-blowers and set forth an employer's appropriate responses to and ways of dealing with employees' protected activities. (C 35; R 41-68)

in whole or in part by his protected activity.

As I have found Complainant has failed to establish that illegal animus, in whole or in part, motivated Respondent's actions against Complainant, there is no need to apply the "dual motive" analysis in this case.

V. CONCLUSION

Complainant has failed to establish that Respondent was motivated by unlawful animus in terminating his job. Moreover, Respondent has come forward with credible evidence that Complainant's discharge was the result of business decisions that were unrelated to Complainant's protected activity. Consequently, I find that Complainant has failed to establish that Respondent violated the Act.

In light of the foregoing, Respondent is not responsible for Complainant's attorney's fees.

RECOMMENDED ORDER

The Complaint of Robert Seater is dismissed.

ROBERT D. KAPLAN
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).